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In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-682

LOCAL UNION NO. 749, INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRON SHIP BUILDERS, BLACKSMITHS, FORGERS & HELPERS, AFL-CIO,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD, CALIFORNIA BLOWPIPE & STEEL CO., INC. and SEQUOIA EMPLOYERS COUNCIL,
Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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193

SUBJECT INDEX

	Page
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statutory Provisions Involved	2
Statement of the Case	3
Reasons for Granting the Writ	4
Conclusion	17
Appendices	

TABLE OF AUTHORITIES

Cases	Pages
I.A.M. v. Gonzales, 356 U.S. 617 (1958)	14
I.A.M. Lodge No. 504 (Arrow Development Co.) 185 N.L.R.B. No. 22	14
Neal v. System Board of Adjustment, 348 F.2d 722 (C.A. 8, 1965)	14
N.L.R.B. v. Allis-Chalmers Mfg. Co., 388 U.S. 175 (1967)	14, 15
N.L.R.B. v. General Motors Corp., 373 U.S. 734 (1963)	2, 4, 7, 8, 9, 10, 12
N.L.R.B. v. Int. Brotherhood of Teamsters C. W. & H. of A., 347 U.S. 17 (1954)	5
N.L.R.B. v. Truck Drivers Etc., Local 639, 362 U.S. 274 (1960)	16
Radio Officers Union, Etc. v. N.L.R.B., 347 U.S. 17 (1954)	2, 5, 6, 14
Union Starch & Refining Co., 87 N.L.R.B. 779 (1949), enf'd, 186 F.2d 1008 (C.A. 7, 1951), cert. den., 342 U.S. 815	4, 10, 12, 13

Statutes	
Labor-Management Reporting & Disclosure Act of 1959:	
§ 402(o)	16
National Labor Relations Act, as amended by Labor Management Relations Act of 1947:	
§ 7 (29 U.S.C. 157)	2
§ 8(a)(3)(29) U.S.C. 158(a)(3)	2, 4, 5, 6, 7, 9, 12
§ 8(b)(1)(A) 29 U.S.C. 158(b)(1)(A)	2, 3
§ 8(b)(2) 29 U.S.C. 158(b)(2)	2, 3
§ 9(e) 29 U.S.C. 159(e)	2

OTHER AUTHORITIES CITED Pages

Congressional Record (as reproduced in Legislative History of the Labor-Management Relations Act of 1947, G.P.O. 1948):
(a) 93 Cong. Rec. 3952 11
(b) 93 Cong. Rec. 3953 12
(c) 93 Cong. Rec. 4193 15
(d) 93 Cong. Rec. 4318 12
(e) 93 Cong. Rec. 5087-8 ..... 11, 12, 15

Senate Report No. 105 on S. 1126 ..... 11, 12

105 Daily Congressional Record 6029, Ap. 25, 1959, II Legislative Hist. of the L.M.R.D.A. 16

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Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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Petitoner respectfully prays that a Writ of Certiorari issue to reveiw a decision of the United States Court of Appeals for the District of Columbia Circuit, enforcing an Order of the National Labor Relations Board.

OPINIONS BELOW

The written opinion of the Court of Appeals, as yet unreported, appears at Appendix A, infra, p. 1. The Decision and Order of the National Labor Relations Board (hereafter the "Board") are reported at 192 N.L.R.B. No. 58, and appear at Appendix B, infra, p. 6.

JURISDICTION

The opinion of Court of Appeals was filed June 30, 1972. A timely petition for rehearing was denied on August 17, 1972, and a formal Judgment entered on September 19, 1972. A stay of mandate has been denied. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a Union, under a lawful union security clause, may demand the discharge of a new employee who after 30 days tenders an amount equal to the initiation fee but refuses to sign an application for membership—the same term and condition of membership generally applicable to all others to whom membership is made available.

2. Whether, and to what extent, this Court's decision in *N.L.R.B. v. General Motors Corp.*, 373 U.S. 734, 743, wherein this Court said that membership insofar as it has significance to employment rights may "be conditioned only upon payment of fees and dues" abrogated this Court's earlier decision in *Radio Officers Union Etc. v. N.L.R.B.*, 347 U.S. 17, 40, wherein this Court explicitly recognized that an employer was prohibited from discharging an employee "if membership 'was not available to the employee on the same terms and conditions generally applicable to other members' or if 'membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership' ".

STATUTORY PROVISIONS INVOLVED

This case involves § 7, § 8(a)(3), § 8(b)(1)(A), § 8(b)(2) and § 9(e)(1) and (2) of the National Labor Relations Act, as amended, 61 Stat. 136, 73 Stat. 519, 29 U.S.C. 157, 158(a)(3), 158 (b)(1)(A) and (2), and 159(3)(e)(1) and (2), which are reprinted in Appendix C, infra, p. 42.

STATEMENT OF THE CASE

The Petitioner, hereinafter "the Union", and California Blowpipe & Steel Co., hereinafter "the Employer", were parties to a written collective bargaining agreement. Rule 2 of that agreement provided, in part, for a union shop security clause. That clause required a new employee to become a union member after the thirtieth day of employment. The provision then required that,

> ". . . when the Employer is notified by the Union in writing that an employee is delinquent in the payment of Union dues, or, within the time required by the Union, has failed to make proper application and pay the initiation fee required, the Employer shall immediately terminate such employee. . . ."

Both the Trial Examiner and the Board found this to be a "lawful" union shop agreement.

Unfair labor practice charges under § 8(b)(1)(A) and § 8(b)(2) were filed against the Union when it sought to enforce this "lawful" provision against three new employees who after 30 days offered to pay initiation fees and dues, but refused to join by signing the application form. Illustrative is the testimony of one new employee by the name of Martin who testified that when asked whether he "was ready to sign up with the Union", responded,

> "And I replied that I would not sign, but I would be willing to pay the dues and Initiation fees." (A. p. 62 [in Court of Appeals], L 21-25).

The Union's form application card has a jurat by which the applicant agrees to be bound by the Union's constitution and by-laws.

The application is the term or condition generally applicable to all applicants for membership in this Union. Article XXIV of the International Union's Constitution provides in pertinent part:

> "An applicant shall become a member of the International Brotherhood when his signed application and fee are received and approved by the International President, and recorded at the office of the International Secretary-Treasurer."

The Board, without comment on the issue raised here, confirmed its Trial Examiner's holding that the application card issue was governed by the Board's 3-2 decision in *Union Starch & Refining Co.*, 87 N.L.R.B. 779 (1949), enf'd, 186 F. 2d 1008 (C.A. 7, 1951), cert. den., 342 U.S. 815.[1]

The Court of Appeals, while nodding in the direction of those arguments of the Union based on the Act and Congressional history, felt that it was constrained to find that "the *Union Starch* rule" had been sanctioned by other Circuits and specifically by this Court in *N.L.R.B. v. General Motors Corp.*, 373 U.S. 734, 742, 743. Appendix A., infra, p. 4.

REASONS FOR GRANTING THE WRIT

This case squarely raises the issue of whether certain language in this Court's decision in *General Motors Corp. v. N.L.R.B., supra,* compels the conclusion that there is under § 8(a)(3) no difference between a "union shop" and an "agency shop" because despite the plain language of the (A) part of the last proviso to § 8(a)(3), a Union may not ask for the discharge of a new employee who refuses to meet the terms of membership generally applicable to all others, but may only demand discharge for a failure to pay an amount equal to fees and dues.

---

1. There was an additional unrelated issue litigated by Petitioner before the N.L.R.B., but in the Court of Appeals the Union sought to review only the issue concerning the use of the application card. It is only that part of the Trial Examiner's opinion, adopted by the Board, which is relevant here. Appendix B, infra, pp. 33-34.

§ 8(a)(3), 29 U.S.C. 158(a)(3), provides in pertinent part:

> "8(a) It shall be an unfair labor practice for an employer—
>
> . . .
>
> (3) by discrimination in regard to hire or tenure of employment or any terms or condition of employment to encourage or discourage membership in any labor organization:
>
> *Provided,* That nothing in this Act . . . shall preclude an employer from making an agreement with a labor organization . . . to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment . . . *Provided further,* That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and initiation fees uniformly required as a condition of acquiring or retaining membership."

In the consolidated cases of *Radio Officers Union Etc. v. N.L.R.B.*, 347 U.S. 17, and *N.L.R.B. v. Int. Brotherhood of Teamsters, C., W. & H. of A., ibid,* this Court first considered the meaning of "membership" in § 8(a)(3) in the context of what an employer could do when faced with a demand for discharge. This Court stated that the Congres-

sional history "clearly indicates that Congress intended to prevent utilization of union security agreements for any purpose other than to compel payment of union dues and fees." 347 U.S. at p. 41.

Both cases, however, involved at most only the (B) part of the last proviso to § 8(a)(3); they did not involve the (A) part. Thus, in the *Teamsters* case an individual who was not a new employee, and who was already a union member, was bumped in seniority at the Union's insistence for late dues payments (when there was not even a valid union security clause). In *Radio Officers,* the employee (a union member) secured a job in violation of the union's dispatching rules, and the union sought his discharge. Neither case then involved a union demand for discharge where the employer was faced with deciding whether membership was made available to a new employee "on the same terms and conditions generally applicable to other members",— the situation covered by (A).

Thus what this Court had to say in *Radio Officers* was perfectly consistent with a (B) clause situation where one already a member and employee has his employment affected for reasons other than the non-payment of dues. The Court, however, had no opportunity to, and indeed did not purport to apply the meaning of (A).

This Court did, however, note expressly that the proviso *had* an (A) part and that an employer needed to be concerned with it when presented by the Union with a demand for discharge:

> "Thus §§ 8(a)(3) and 8(b)(2) were designed to allow employees to freely exercise their right to join unions, be good, bad, or indifferent members, or abstain from joining any union without imperiling their livelihood. The only limitation Congress has chosen to impose on this right is specified in the proviso to § 8(a)(3) which authorizes employers to enter into certain union se-

curity contracts, but prohibits *discharge* under such contracts *if membership 'was not available to the employee on the same terms and conditions generally applicable to other members' or* if 'membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership' ". (Id., p. 40; Emphasis added).

In *General Motors Corp. v. N.L.R.B., supra,* the employer was charged with a refusal to bargain because it would not bargain for an agency shop clause, which clause was then lawful in Indiana. The employer's position was that the first proviso to § 8(a)(3) allowing an employer and a union to make an agreement requiring "membership" was to be strictly interpreted and did not allow agency shop agreements because they were the antithesis of "membership". Relying on administrative practice whereby the Board had approved the agency shop before Taft-Hartley and on legislative history, this Court in an opinion by Justice White rejected such a narrow reading and held that "less vigorous, less compulsory contracts which demand less adherence to the union" than the union shop are necessarily included in "membership" and allowable under the first proviso to § 8(a)(3) and that the employer had accordingly refused to bargain.

This Court having decided that even the agency shop was allowable under the first proviso to § 8(a)(3), now some of the language of its opinion is ironically advanced for the proposition that there is, in total effect, no other type of "membership" allowable under § 8(a)(3).[2]

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2. The irony is compounded when it is recalled that the agency shop only came into prominence after Taft-Hartley as an alternative proposal when a Union could not get an employer to agree in collective bargaining to the union shop or in an attempt to skirt the Right to Work provision of § 14(b) in the same 1947 legislation.

Thus, the Court of Appeals relied on the following language of this Court in *General Motors:*

> "It is permissible to condition employment upon membership, but membership, insofar as it has significance to employment rights, may in turn be conditioned only upon payment of fees and dues. 'Membership' as a condition of employment is whittled down to its financial core . . . .
>
> If an employee in a union shop unit refuses to respect any union-imposed obligations other than the duty to pay dues and fees, and membership in the union is therefore denied or terminated, the condition of 'membership' for § 8(a)(3) purposes is nevertheless satisfied and the employee may not be discharged for nonmembership even though he is not a formal member.[10]
>
> 10. Union Starch & Ref. Co. v. Labor Board, 186 F.2d 1008 (C.A. 7th Cir.) . . . ."

If what this Court said in *General Motors* is considered in a vacuum, then indeed *General Motors* has read the (A) part of the proviso out of the Act and has quietly abrogated *Radio Officers* because this Court explicitly recognized in that case that there was an (A) portion to the proviso and that the employer had to be concerned with whether membership had been available to the new employee on the "same terms and conditions generally applicable to other members" before it could agree to a *discharge.*

§ 8(a)(3) manifestly does not say what shall constitute "membership". Specifically it is clear that § 8(a)(3) does not say that the payment of dues and fees makes an individual, ipso facto, a "member", or that the Act imposes on the new employee the duties of membership as soon as he makes his tender. § 8(a)(3) merely says that the union and the employer may make a union security agreement. The second proviso limits its enforceability in terms of the employee's job by telling the employer that he must be con-

cerned with two things when faced with a demand for discharge. The first is whether he has reasonable grounds for believing that membership was not available to the employee on the same terms and conditions generally applicable to others. The second is whether he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure to tender dues and fees. It is also important to note the disjunctive "or" between (A) and (B). The Employer could face either one or both of the situations envisioned by (A) and (B).

If the position of the Board and of the Court of Appeals was correct and the employer need only be concerned with a tender of money, there would be absolutely no discernible reason for the employer to be concerned with possible discriminatory terms and conditions of membership. Yet he is charged by the Act with such concern, and he is so charged precisely and only because the employee can be subject to discharge. The fact that (A) appears in the Act at all, and that the employer must be concerned with the subject matter of (A), leads ineluctably to the conclusion that a union, as a consequence of a valid union security agreement, may demand to the point of discharge that a new employee meet those membership terms and conditions which are generally applicable to other members.

There is no question in this case but that the application is a term or condition generally applicable under the International Brotherhood's Constitution and By-Laws of the petitioner. There is no charge that the Union was seeking to impose any discriminatory term, and it is only "discrimination" that the employer is charged with avoiding under § 8(a)(3).

General Motors did not involve generally applicable terms and conditions of membership. Thus, this Court has not had

an opportunity to apply § 8(a)(3) in a case involving discharge of a new employee under the (A) part of the proviso. Yet, what this Court has had to say in another context is being used to read (A) out of the Act and to do away with any effective distinction between the union and agency shop.

The Court of Appeals failed to note that in *General Motors* there was no issue of generally applicable terms and conditions for membership; that there is nothing in the opinion of that case to indicate that Justice White had the (A) part of the second proviso in mind; and, that such inferences should not have been easily attributed to the opinion when to do so would ignore (a) the narrow issue decided in *General Motors,* (b) one express clause in the Act, (c) *Radio Officers,* and (d) a considerable wealth of Congressional history.

Similarly, the Court of Appeals felt that this Court's footnote reference in *General Motors*[3] to *Union Starch & Refining Co. supra,* precluded an independent review of whether that 3-2 decision of the Board was correct, at least to the extent that *Union Starch* dealt with the issue raised here. The Court of Appeals failed to note that everything this Court said in *General Motors* was correct if limited to the context of (B) and that a general reference to *Union Starch* went no further. Indeed this Court cited in the same note other cases, some of which are relied on by the Court of Appeals and all of which are solely (B) type cases.

To the extent *Union Starch* held that a union under a valid security agreement can only demand discharge for a failure to tender initiation fees and dues, *Union Starch* is in error. Such a holding ignores the (A) part of the proviso, as argued above, and ignores equally the Congressional history. That history shows that Congress clearly knew the

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3. 373 U.S. 743, n. 10.

difference between a "closed shop" and a "union shop" and while banning the closed shop, did not equate the union shop with simply paying for the services of the union. In banning the "closed shop", Congress sought to correct the abuse whereby a man had to be a union member in order to get a job. Senate Report No. 105 on S. 1126, p. 6, stated that the closed shop "creates too great a barrier to free employment to be longer tolerated". The Senate Report described the remedy:

> "Under the amendments which the committee recommends, employers would *still be permitted* to enter into agreements requiring all the employees in a given bargaining unit *to become members 30 days* after being hired if a majority of such employees have shown their intent by secret ballot to confer authority to negotiate such an agreement upon their representatives." (Emphasis added; Id at p. 7)

The ultimate requirement for membership, albeit after thirty "free" days was not altered one wit. Said Senator Taft:

> "They do not abolish the union shop. They do abolish the so-called closed shop. . . . A union shop is defined as a shop in which the employer binds himself not to continue anyone in employment after the first 30 days unless he joins the union. In other words, an employer may employ anyone whom he chooses to employ, but after 30 days such employee has to join the union or else the employer can no longer employ him". (93 Cong. Rec. 3952, Ap. 23, 1947)

And,

> "But the bill permits the union shop which is *the customary form of employment in the United States.*" (93 Cong. Rec. 5087; Emphasis added).

Another abuse Congress sought to remedy by the 1947 amendments to § 8(a)(3) involved instances of arbitrary refusal of, or termination of, union membership and the subsequent loss of a job. Senate Report No. 105 on S. 1126, p. 6-7. The remedy provided:

> "(1) Membership in the union must be available to an employee on the same terms and conditions generally applicable to other members; (2) expulsion from a union cannot be a ground of compulsory discharge if the worker is not delinquent in paying his initiation fee or dues; . . . ." (*Ibid,* p. 7)

These two remedial concepts are clauses (A) and (B) of the last proviso of § 8(a)(3). Concerning this (A) part, Senator Taft explained its purpose (93 Cong. Rec. 3953, Ap. 23, 1947):

> "In the second place, we have proposed a proviso in the case where a man is refused admittance to a union, when an employer employs a nonunion man, and during the first 30 days of his employment he goes to the union and says, 'I want to join the union,' but the union refuses to take him. It is provided that in such case the employer shall not be compelled to discharge the man simply because the union will not let him join the union on the same terms and conditions as any other member".[4]

The (B) clause was designed to protect the man who was *already* an employee and *already* a member from having his employment affected for any reason other than nonpayment of dues (Taft, 93 Cong. Rec. 4318, Ap. 29, 1947; 93 Cong. Rec. 5087-8, May 9, 1947). Thus the word "denied" in (B) must be read in the context of both (A) and (B), as is so clear from the Congressional history. See too dissent in *Union Starch, supra.* The Congress fully intended

4. See too Taft, 93 Cong. Rec. 5087-8.

that a man would have to join the union by satisfying generally applicable terms and conditions of membership *and* by paying fees and dues. It did not abolish the traditional union shop, nor did it reduce the union shop to an agency shop.

That part of the *Union Starch* holding which the Union seeks to have reviewed has *not* been judicially reviewed, with the exception of the Seventh Circuit. Contrary to the Court of Appeals, Appendix A., infra, p. 4, the *Union Starch* rule has not been sanctioned in other circuits any more than it has by this Court. The tactic of the Board and the Intervenors below was to ignore the arguments based on the Act and legislative history and to steamroller the Court of Appeals with judicial expressions arising in cases in which *Union Starch* was cited, but in none of which was there an (A) situation involving generally applicable terms and conditions.[5] All of the cases cited by the Board, and then by the Court of Appeals (Appendix A, infra, p. 4, n.2) are distinguishable upon a simple reading on the basis they either deal with an "old" employee who was already a member and thus could only have his employment affected for nonpayment of dues, or, the union was seeking to enforce a specific rule peculiar to a given individual, and often on a basis which would require a prohibited retroactive effect to the security clause. In none of the cases was discharge sought for a refusal to meet "terms and conditions generally applicable" for membership.

Thus, if the decision below is allowed to stand this Court's comments in *General Motors* will have been read

5. Indeed the Court of Appeals accidentally issued its opinion without waiting for the timely filing of the Union's Reply Brief in which these cases were distinguished. Although rehearing was sought on the grounds that the Board's cases were non-applicable, the Court denied rehearing without modifying its opinion in any respect.

to abrogate this Court's earlier statement of the law in *Radio Officers* and to have destroyed the union shop. The conflict between the decisions of this Court, whether more apparent than real, has been no less effectively misleading. The effects on labor and the national labor policy are incalculable.

Up to now the union-member relationship has been thought to be a relationship sounding in contract. *Neal v. System Board of Adjustment,* 348 F. 2d 722 (C.A. 8, 1965); *I.A.M. v. Gonzales,* 356 U. S. 617, but the efficacy of this contract has been held to be "precisely its legal enforceability". *N.L.R.B. v. Allis-Chalmers Mfg. Co.,* 388 U. S. 175, 192. If the employee in the union shop does not sign the application, he acquires neither the rights nor the duties of membership. Even the amount and the obligation to pay dues can only be compelled so long as there is this contractual basis for doing so. *I.A.M. Lodge No. 504 (Arrow Development Co.),* 185 N.L.R.B. No. 22. Without the employee obligated to becoming a member, the Union has no right or ability to control, or discipline, or otherwise direct a disciplined, solidified effort in the union shop.

This Court has recognized that such control is integral to the national labor policy:

> "Integral to this federal labor policy has been the power in the chosen union to protect against erosion its status under that policy through reasonable discipline of members who violate rules and regulations governing membership. That power is particularly vital when the members engage in strikes. The economic strike against the employer is the ultimate weapon in labor's arsenal for achieving agreement upon its terms, and '[t]he power to fine or expel strikebreakers is essential if the union is to be an effective bargaining agent * * *.[8]' Provisions in union constitutions and bylaws for fines and expulsion of recalcitrants, including strikebreakers, are therefore commonplace and were commonplace at the time of

> the Taft-Hartley amendments.[9]" *N.L.R.B. v. Allis-Chalmers, supra,* at p. 181-2.

The Trial Examiner, however, came to the startling conclusion that the employee in a union shop cannot sign an application because "he is subjecting himself to possible fines which could not be imposed on those who pay only the initiation fees and dues which the Act permits to be charged by a union as a condition of continued employment". Appendix B, infra, p. 33. The General Counsel argued to the Court of Appeals that this was "dictum" and should be ignored (N.L.R.B. Brief, p. 12); and the Court of Appeals has agreed. Appendix A, infra, p. 3, n. 3. It does not serve the national labor policy to ignore the immediate and certain consequences of the decision below.

Senator Taft in 1947 not only made clear that the bill would allow the union shop, "the customary form of employment in the Union States," 93 Cong. Rec. 5087-8, but indicated quite clearly that the union would not lose its power of control:

> "The pending measure does not propose any limitation with respect to the internal affairs of unions. They still will be able to fire any members they wish to fire, and they still will be able to try any of their members. All that they will not be able to do, after the enactment of this bill, is this: If they fire a member for some reason other than nonpayment of dues they cannot make his employer discharge him from his job and throw him out of work. That is the only result of the provision under discussion." 93 Cong. Rec. 4193.

Senator Taft's guarantee was utter nonsense if he did not recognize that the union shop first required the employee to join the union.

The distinction between "formal" and "full" members is a creature of uncertain judicial creation and has no roots in the Congressional history. Rather, Congress' concern was that the employee's job be insulated no matter whether he was a good, bad or indifferent member—but a member he must be.

Congress has continued to show it knows what is meant by the union shop and membership. In the Labor Management Reporting and Disclosure Act of 1959, 29 U.S.C. 402, Congress defined a "member" in § 402(o) as one "who has fulfilled the requirements for membership in such organization . . . ."[6] If the decision below is allowed to stand, the rights and democratic measures of the L.M.R.D.A. will be available only to those who "voluntarily" choose to become "full" members. It was precisely because full union membership could be compelled by the union security clause that the national labor policy required that those subject to a union's constitution and by-laws have certain minimum safeguards. Thus said Senator Goldwater:

> "If we were dealing with an organization in which membership was not compulsory— . . . Mr. President, if we were dealing with organizations in which membership was purely voluntary—for instance, business organizations, fraternal organizations and so forth—I would hold with the Senator's argument. But we are dealing with organizations to which—in most cases—a man must belong if he is to work." 105 Daily Congressional Record 6029, April 25, 1959, II Legis. Hist. of the L.M.R.D.A. p. 1235.

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6. Because this later Act is but part of an evolving pattern of Congressional regulation, the Court may take into account this later Act when asked to extend the reach of the earlier Act's language beyond what was intended. *N.L.R.B. v. Truck Drivers Etc. Local No. 639,* 362 U.S. 274, 291-2 (1960). The L.M.R.D.A. casts light on the proper concept of membership.

CONCLUSION

For the foregoing reasons, it is respectfully urged that the writ of this Court be issued.

Dated at San Francisco, California, this 31 day of October, 1972.

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(Appendices Follow)

Appendix A

United States Court of Appeals
for the District of Columbia Circuit

No. 71-2006

LOCAL UNION NO. 749, INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRON SHIP BUILDERS, BLACKSMITHS, FORGERS & HELPERS, AFL-CIO, PETITIONER,

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT,
CALIFORNIA BLOWPIPE & STEEL CO., INC.
AND SEQUOIA EMPLOYERS COUNCIL, INTERVENOR.

On Petition for Review and Cross-Application
for Enforcement of an Order of
The National Labor Relations Board

Before McGOWAN, LEVENTHAL and MacKINNON, *Circuit Judges.*

PER CURIAM: Petitioner Union challenges the National Labor Relations Board's findings that it violated Sections 8(b)(2) and 8(b)(1)(A) of the National Labor Relations Act, 29 U.S.C. §§ 158(b)(2) and 158(b)(1)(A). The single issue before us is whether a union may lawfully request an employer, with whom it has a union security agreement, to fire an employee who, although willing to pay the requisite union dues and fees, refuses to assume formal union membership.

Intervenor California Blowpipe and Steel Company and the Union were parties to a collective bargaining agreement which provided:

> All employees covered by this Agreement . . . shall, within the time required by the Union after the thirtieth day following the beginning of their employment . . . become and remain members of the Union in good standing, as a condition of continued employment. . . .
>
> [W]hen the Employer is notified by the Union in writing that an employee is delinquent in the payment of dues, or, within the time required by the Union, has failed to make proper application and pay the initiation fee required, the Employer shall immediately terminate such employee.

It is undisputed that during the year 1970 the Union requested the Company to terminate the employment of three employees who, although willing to pay the required Union dues and initiation fees, refused to sign the Union's membership application card. On the basis of an interpretation of Section 8(a)(3) of the Act first adopted in *Union Starch and Refining Company*, 87 NLRB 779 (1949), *enf'd* 186 F.2d 1008 (7th Cir.), *cert. denied*, 342 U.S. 815 (1951), the Board concluded that these requests were forbidden by the Act. The Union contends, contrarily, that such requests are expressly permitted by Section 8(a)(3), and urges this Court to reject *Union Starch*.

Section 8(a)(3) provides in pertinent part:

> 8(a) It shall be an unfair labor practice for an employer—
>
> . . .
>
> (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this Act . . . shall preclude an employer from making an agree-

> ment with a labor organization . . . to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment . . .
>
> *Provided further,* That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and initiation fees uniformly required as a condition of acquiring or retaining membership.

Section 8(b)(1) makes it an unfair labor practice for unions generally "to restrain or coerce employees in the exercise of the rights guaranteed in Section 7," and Section 8(b)(2) specifically prohibits unions from causing or attempting to cause an employer "to discriminate against an employee in violation of (Section 8(a)(3))."

It is the Board's position that part (B) of the second proviso in Section 8(a)(3) forbids a union from attempting to cause an employer to discharge an employee for any reason other than the employee's failure to tender periodic dues and fees. As one court has put it:

> Even where, as in the instant case, all the statutory requirements of a valid union shop agreement are met, the Act provides that the only ground upon which an employee can be lawfully discharged is for nonpayment of initiation fees or periodic dues. Nothing else suffices.

N.L.R.B. v. Technicolor Motion Picture Corp., 248 F.2d 348, 352 (9th Cir. 1957). The Union argues, on the other hand, that (1) Section 8(a)(3) expressly permits unions and employers to agree to condition continued employment on union "membership" and that "membership" is not equivalent to a mere willingness to pay dues and fees, (2) the Board's interpretation in effect imposes on unions a definition of membership which violates the statutory right of labor organizations under Section 8(b)(1)(A) to establish membership qualifications for themselves, (3) the legislative history does not support the Board's position, (4) that position effectively destroys union security, which the Act was manifestly designed to protect, and abolishes the distinction between "union shops" and "agency shops" which the framers of Section 8(a)(3) clearly recognized, and (5) the Board's interpretation of part (B) of the proviso renders part (A) a nullity.[1]

Whatever force these arguments might have were the question before us *res nova*, the *Union Starch* rule which the Board applied here has been sanctioned by virtually every other circuit court of appeals in the United States and referred to approvingly by the Supreme Court and this court.[2] In *N.L.R.B. v. General Motors Corp.*, 373 U.S.

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1. The Union argues alternatively that *Union Starch* is factually distinguishable, in that the employees there desired membership, whereas the employees here did not. In terms of an employee's right under Section 8(a)(3) to be protected from discharge for non-union membership, we think it irrelevant whether the employee did or did not desire membership in the Union. *See* N.L.R.B. v. General Motors Corp., 373 U.S. 734, 742, 743 (1963).

2. *See, e.g.*, I.U.E., Local 801 v. N.L.R.B., 113 U.S.App.D.C. 342, 345, 307 F.2d 679, 682, *cert. denied*, 371 U.S. 936 (1962); N.L.R.B. v. Zoe Chem. Co., 406 F.2d 574, 579 (2d Cir. 1969); N.L.R.B. v. Philadelphia Iron Works, Inc., 211 F.2d 937, 941 (3rd Cir. 1954); N.L.R.B. v. Pape Broadcasting Co., 217 F.2d 197, 199 (5th Cir. 1954); J.A. Utley Co. v. N.L.R.B., 217 F.2d 885, 886 (6th Cir. 1954); N.L.R.B. v. Spector Freight Systems, Inc., 273 F.2d 272 (8th Cir.), *cert. denied*, 362 U.S. 962 (1960); N.L.R.B.

734, 742, 743 (1963), the Supreme Court stated quite unambiguously:

> It is permissible to condition employment upon membership, but membership, insofar as it has significance to employment rights, may in turn be conditioned only upon payment of fees and dues. "Membership" as a condition of employment is whittled down to its financial core. . . .
>
> If an employee in a union shop unit refuses to respect any union-imposed obligations other than the duty to pay dues and fees, and membership in the union is therefore denied or terminated, the condition of "membership" for § 8(a)(3) purposes is nevertheless satisfied and the employee may not be discharged for nonmembership even though he is not a formal member.[10]

10. Union Starch & Ref. Co. v. Labor Board, 186 F.2d 1008 (C.A. 7th Cir.) ....

See also N.L.R.B. v. Allis-Chalmers Mfg. Co., 388 U.S. 175, 197, n. 37 (1967); *Motor Coach Employees v. Lockridge*, 403 U.S. 274, 284 (1971). In view of this long-established array of authority, we regard the issue as settled.[3]

The Union's petition for review is denied, and the Board's cross-petition for enforcement of its order is granted.

It is so ordered.

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v. Technicolor Motion Picture Corp., 248 F.2d 348, 352 (9th Cir. 1957); N.L.R.B. v. Broderick Wood Products Co., 261 F.2d 548, 558 (10th Cir. 1958).

3. Our decision here is limited to the issue of discharge from employment. We decide nothing, and we intimate no opinion, as to the extent of a union's power to discipline an employee who, though refusing formal membership, pays union dues and fees.

Appendix B

192 NLRB No. 58

D—5192
Escalon, Calif.

United States of America
Before the National Labor Relations Board

Case 20—CB—2041

LOCAL UNION NO. 749, INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRON SHIP BUILDERS, BLACKSMITHS, FORGERS & HELPERS, AFL-CIO (California & Blowpipe & Steel Co., Inc.)[1]

and

Case 20—CB—2253

SEQUOIA EMPLOYERS COUNCIL

LOCAL UNION NO. 749, INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRON SHIP BUILDERS, BLACKSMITHS, FORGERS & HELPERS, AFL-CIO (California Blowpipe & Steel Co., Inc.)

and

DOUGLAS C. MARTIN, an Individual

DECISION AND ORDER

On January 28, 1971, Trial Examiner James R. Hemingway issued his Decision in the above-entitled proceedings, finding that the Respondent had engaged in and was engaging in certain unfair labor practices within the meaning of Section 8(b)(5), (2) and (1)(A) of the National Labor Relations Act, as amended, and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the attached Trial Examiner's Decision. Thereafter, the Respondent filed exceptions to the Decision and a supporting brief,[2] the Charging Parties and Inter-

1. California Blowpipe & Steel Co., Inc., was permitted to intervene as a Party to the Contract.

2. The Respondent excepts, *inter alia*, to the Trial Examiner's denial to grant Respondent's motion to strike paragraph IX(b) of the complaint. We find the Respondent's motion to be without merit and it is hereby denied. *Atlas Boot Mfg. Co.*, 116 NLRB 565; *H. N. Thayer Co.*, 99 NLRB 112; *Kohler Co.*, 220 F.2d 3 (C.A. 7).

venors filed an answering brief, and the General Counsel filed limited exceptions and a brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its powers in connection with this case to a three-member panel.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Trial Examiner's Decision, the exceptions and briefs, and the entire record in this proceeding, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner with the modifications set forth below.

As alleged in the complaint, we find that the Respondent violated Section 8(b)(5), (2), and (1)(A) of the Act in charging employee Louis Daniels an excessive reinstatement fee and requesting the Company to discharge Daniels for failure to pay said excessive fee. We need not pass upon the Trial Examiner's alternative finding in this connection (TXD, section V, B, p. 15).

The General Counsel takes limited exception to apparent dicta by the Trial Examiner wherein he states:

> When Martin asked, "Why so much?" Runyon replied, again according to Martin, that it was because everyone else had signed up. The figure of $300 and Runyan's reply strike me as unusual and difficult to understand. Runyan was not called as a witness to correct the testimony, but if Runyan made some such statement, I am inclined to believe that he was either not fully, or not accurately, quoted.[3]

We find no basis in the record upon which the Trial Examiner could base such a supposition since the testimony was

3. Trial Examiner's Decision, sec. V, p. 13, ll. 22—27.

totally undenied and uncontradicted; accordingly, we disavow the Trial Examiner's dicta.

We amend the Trial Examiner's Conclusions of Law as follows:

By substituting for his Conclusion 4 the following:

> 4. By attempting to cause the Employer to terminate the employment of Louis Daniels for failure to pay a reinstatement fee which was excessive under all the circumstances, Respondent engaged in unfair labor practices within the meaning of Section 8(b)(5), (2), and (1)(A) of the Act.

By changing Trial Examiner's Conclusion of Law 4 to 5 and modifying it to read as follows:

> 5. By attempting to cause the Employer to terminate the employment of Douglas C. Martin, Jeffrey Roberts, and Michael Roberts for reasons other than nonpayment of initiation fees or dues uniformly required as a condition of continued employment under its lawful union shop agreement, Respondent has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(b)(2) and (1)(A) of the Act.[4]

Renumber Trial Examiner's Conclusion of Law as 6.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Trial Examiner, and hereby orders that the Respondent, Local Union No. 749, International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers & Helpers AFL-CIO, Escalon, California, its officers, agents, and repre-

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4. There is no direct evidence in the record that Respondent requested the Employer to discharge Jeffery Roberts but there is conclusive evidence that Respondent threatened that it would seek his discharge.

sentatives, shall take the action set forth in the Trial Examiner's recommended Order.

Dated, Washington, D.C. Aug 4 1971

/s/ EDWARD B. MILLER, Chairman
/s/ GERALD A. BROWN, Member
/s/ HOWARD JENKINS, JR., Member

NATIONAL LABOR RELATIONS BOARD

(SEAL)

TXD-(SF)-3-71
Escalon, Calif.

United States of America

Before the National Labor Relations Board

Division of Trial Examiners
Branch Office
San Francisco, California

Case No. 20-CB-2041
LOCAL UNION NO. 749, INTERATIONAL BROTHERHOOD OF BOILERMAKERS, IRON SHIPBUILDERS, BLACKSMITHS, FORGERS & HELPERS, AFL-CIO (CALIFORNIA BLOWPIPE & STEEL CO., INC.)

and

Case No. 20-CB-2253
SEQUOIA EMPLOYERS COUNCIL
LOCAL UNION NO. 749, INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRON SHIPBUILDERS, BLACKSMITHS, FORGERS & HELPERS, AFL-CIO (CALIFORNIA BLOWPIPE & STEEL CO., INC.)

and

DOUGLAS C. MARTIN, An Individual

Gerald E. Lucey, for the General Counsel.
Donald C. Carroll, of San Francisco, Calif., and *John J. Blake,* of Kansas City, Kans., for Respondent.
George J. Tichy, II, of San Francisco, Calif., for the Charging Parties and the Employer.

TRIAL EXAMINER'S DECISION

I. Statement of the Case

Before JAMES R. HEMINGWAY, Trial Examiner: The charge in Case No. 20-CB-2041, filed on June 16, 1969, by August Sommerfeld of the Sequoia Employer Council, alleges a violation of Section 8(b)(2) and (5) of the National Labor Relations Act, as amended, 29 U.S.C. Sec. 151 *et seq.*, herein called the Act. The charge in Case No. 20-CB-2253, filed on May 25, 1970, by Douglas C. Martin, an individual, alleges a violation of Section 8(b)(1)(A) and (2) of the Act. The cases were consolidated by order of the Regional Director and a consolidated complaint and notice of hearing was issued on August 26, 1970. An amendment to the complaint was issued and served on the parties on September 25, 1970. Respondent, on October 8, 1970, filed an answer to the complaint as amended in which it denied the alleged unfair labor practices.

Pursuant to notice, a hearing was held before me at Stockton, California, on November 5 and 6, 1970, and at San Francisco, California, on November 20, 1970. At the opening of the hearing, the Employer, California Blowpipe & Steel Co., Inc., moved to intervene because the issues concerned the terms of its agreement with the Respondent, and the decision herein could affect those provisions. The motion was granted. The General Counsel moved to amend the amended complaint in respect to the expiration date of the contract involved, the description of the appropriate unit to conform to that stated in the contract and to delete the names of certain employees allegedly affected by the alleged unfair labor practices and to add additional ones.

II. Issues

1. Whether or not Respondent required, pursuant to a union shop contract, that certain dues-delinquent employees pay reinstatement fees which were excessive under all the circumstances.

2. Whether or not Respondent attempted to cause the Employer to terminate the employment of an employee for nonpayment of an excessive reinstatement fee.

3. Whether or not Respondent attempted to cause the Employer to terminate the employment of three employees for reasons other than the failure of such employees to tender initiation fees and periodic dues.

III. The Business of the Employer

California Blowpipe & Steel Co., Inc., herein called the Employer, is a California corporation with a place of business in Escalon, California, where it is engaged in the fabrication and erection of steel products.

During the year preceding the issuance of the complaint, the Employer sold and provided goods and services valued in excess of $50,000 directly to customers located outside the State of California. During the same period of time, the Employer purchased and received at its facility in Escalon, California, goods and products valued in excess of $50,000 directly from suppliers located outside the State of California.

I find that the Employer is engaged in commerce within the meaning of the Act and that it will effectuate the policies of the Act to assert jurisdiction.

IV. Respondent Labor Organization and its Agreement

The Respondent, a labor organization within the meaning of the Act, has a collective-bargaining agreement with the Employer, for the term from May 16, 1969,[1] to May 20,

1. This is the effective date shown at the top of the agreement in evidence. The agreement in evidence is not signed or dated, although a letter of understanding attached to the agreement is dated March 24, 1970. But this letter is signed by Respondent's representatives only. In an affidavit made on an undisclosed date in 1970 by Ralph Runyan, Secretary-Treasurer of the Respondent, in connection with a suit between Runyan and the Employer in the United States District Court for the Eastern District of

1971, which agreement contains a provision requiring all employees who are present members of Respondent to maintain their membership in good standing; all other employees are required, after the 30th day following the beginning of their employment or the effective date of the agreement, whichever is later, to become and remain members of Respondent as a condition of continued employment. There follows a clause reading:

> (D) In the application of Paragraphs (B) and (C) above, when the Employer is notified by the Union in writing that an employee is delinquent in the payment of Union dues, or, within the time required by the Union, has *failed to make proper application* and pay the initiation fee required, the Employer shall immediately terminate such employee. Such employee shall not be reemployed by the Employer during the life of this agreement, until notified by the Union that the employee is a member in good standing in the Union, or such employee presents a work clearance from the Union to the Employer. [Italics supplied.]

V. The Unfair Labor Practices

A. *The Issue of an Excessive Reinstatement Fee*

The complaint alleges that "from or about December 16, 1968, and continuing thereafter, Respondent has required dues-delinquent employees . . . in the unit . . . covered by the collective bargaining agreements . . . to pay, as a condition of employment in said unit, fees which have been

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California, Runyan avers that the collective-bargaining agreement was entered into on March 24, 1970, "effective May 20, 1969," for a term running to May 20, 1971. If this is not an error, the agreement is made retroactive in effect from March of 1970 back to May of 1969. The effect of such retroactive agreement upon the legality of the union-shop provision was not mentioned in the complaint, was not raised at the hearing, and was not discussed in the briefs of the parties. I therefore ignore it.

excessive under all the circumstances . . ." and this is alleged to be a violation of Section 8(b)(5) of the Act.

1. Constitution and by-laws; practice thereunder

The constitution of Respondent's parent organization which was in effect between 1965 and August 1969, which period embraces the time of certain events herein related, provides:

ARTICLE XXVIII

INITIATION FEES AND DUES

Initiation Fees

Section 1. The initiation fee shall be determined by the Local Lodge but shall be not less than Fifteen Dollars ($15) and in no event shall be more than Four Hundred Dollars ($400).[2] Arrangements for payment of initiation fees by installments may be made in accordance with approved Local Lodge By-Laws or an applicable collective bargaining agreement. Any fees paid to apply on initiation fees shall be forfeited in the event payment for such initiation is not completed.

The International President shall have the authority to grant a special dispensation reducing initiation and reinstatement fees for special cases, where organizing activities are in progress or are contemplated, for such period of time as may be determined by him.

Any applicant for membership who presents acceptable evidence of current good standing in some other labor organization with which the International Brotherhood has a reciprocal agreement may be admitted to membership upon the payment to the International Brotherhood of one month's dues, and upon executing the Brotherhood's application form.

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2. The language of Article XXVIII here quoted was taken from the constitution which became effective in mid-August 1969, since the excerpt of the earlier constitution in evidence did not include Article XXVIII except as to the last few lines of it, which are immaterial here. The amount of $400 was presumably an increase from $300 provided in the earlier constitution.

Dues

Section 2. All monthly dues shall be payable on the first day of each month and should be paid monthly in advance. • • •

ARTICLE XXIX

SUSPENSION AND REINSTATEMENTS

Suspension for Non-Payments

Section 1. Whenever any member allows his monthly dues, death benefit contributions, assessments, or fines to become two (2) calendar months in arrears, he shall be automatically suspended from all rights, privileges, and benefits of the International Brotherhood. No monthly dues shall be accepted until all financial obligations owed to the Brotherhood or any subordinate body, such as field dues, district lodge dues, fines or assessments have been paid.

Reinstatement of Members Suspended for Non-Payments

Section 2. In order for such member to be recorded again in good standing, he shall personally make application for reinstatement with the Lodge having jurisdiction where he is working, and shall be obligated to pay, in addition to his financial delinquencies, a reinstatement fee in an amount determined by the subordinate body, such fee, however, to be not less than Twenty-Five Dollars ($25) and not more than Three Hundred Dollars ($300).[3] Arrangements for the payment of reinstatement fees by installments may be made in accordance with approved Local Lodge By-Laws or an applicable collective bargaining agreement. Any fees paid to apply on reinstatment fees shall be forfeited in the event payment for such reinstatement is not completed. The application for reinstatement and the member's reinstatement receipt shall show the full amount collected and shall bear the full name and full signature of the applicant.

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3. This amount is $400 in the 1969 constitution.

Another section covers the procedure for reinstatement of members expelled or suspended for reasons other than nonpayment of dues.

The by-laws of Respondent, approved March 1, 1966, which continued in effect until December 29, 1969, so far as is applicable here, provide for an initiation fee of $200 for mechanics and $150 fee for helpers, and a reinstatement fee of $300 for mechanics and $250 for helpers.[4]

If a member became delinquent in his dues on and after the beginning of the third month, the Respondent usually would notify the delinquent member that he was delinquent; and when that suspended member would seek to become current, the Respondent's secretary-treasurer would inform him that he would have to pay a $250 reinstatement fee plus his back dues as a condition of continued employment. The delinquent member was given 3 months in which to pay this sum, but his delinquent dues would not be accepted until payment of the readmission fee. If the delinquent dues payer failed to pay in full within the 3-month period, the Respondent would make a written demand on the Employer that such employee be discharged pursuant to the union-shop clause of the collective-bargaining agreement.

2. Specific instances of Respondent's Requirement of Payment of Reinstatement Fee and Rates of Pay of Employees

Ernest Benge, hired by the Employer as a helper about 5½ years before the date of the hearing, became a member of Respondent but fell in arrears in the payment of his dues in late 1968. The Respondent's secretary-treasurer, Ralph Runyan, told Benge that he would have to pay the $250 reinstatement fee. The alternative was discharge. Benge

4. The General Counsel makes no contention with regard to the reasonableness of the reinstatement fee required under the later by-laws, approved in December 1969.

paid this required sum in ten weekly installments of $25 each between January 4 and March 8, 1969. During that time, Benge's take-home pay was about $128 a week.[5]

William Haslam, hired as a helper in January 1968, joined the Respondent about a month later and paid his $8.50 monthly dues until March or April of 1969, when he failed to pay for 2 months and thus became delinquent in the payment of his dues. His check for 3 months' dues was returned to him by the Respondent with a letter notifying him that he was delinquent. Haslam consulted with Runyan about the matter and Runyan told him the reinstatement fee was $250. Haslam borrowed that amount from a relative and paid it in a lump sum in August 1970. At the time of the hearing, he still owed his relative $175 on that loan. At the time he became delinquent, Haslam's wage rate was about $3.76[6] an hour, or a gross of $151.20 per 40-hour week. There is no evidence as to his take-home pay.

Louis Daniels was employed by the Employer as a welder's helper for about 6 years at the time of the hearing. He became a member of the Respondent and paid his dues, but not regularly each month. In the latter part of 1968, he became delinquent in the payment of his dues.[7] When he mailed the Respondent a money order for 3 months' dues in late December 1968, the Respondent returned the payment with

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5. His gross pay cannot be ascertained because no evidence was adduced to show any rates of pay in effect before May 16, 1969, the effective date of the collective-bargaining agreement introduced into evidence.

6. Haslam testified that his rate was $3.70. The collective-bargaining agreement indicates that the rate for his job in August 1969 was $3.76 an hour if he was on the third shift. The second shift rate for him would have been $3.66 and that for the first shift $3.50. At that time there was no rate of $3.70.

7. According to a letter from Respondent to Daniels, the latter owed dues for September, October, November, and December when on December 31, 1968, Daniels mailed in 3 months' dues.

a statement that it would be necessary for him to be reinstated and that that should be done at once. Daniels returned the money order in late January 1969 with a request that it be applied as part payment on his reinstatement fee. Respondent acknowledged receipt of part payment thereof. Daniels paid another $75 in late January. On an undisclosed date thereafter, Daniels protested that he had paid a sufficient "fine" and that the money he had paid, in excess of $49.50 should be applied toward his dues through February. On March 3, 1969, Respondent returned to Daniels a money order for $8.50, apparently tendered by Daniels as his March dues, with a statement that, since he was not a member in good standing, his reinstatement fee would first have to be paid and that this would have to be done by April 13 or Respondent would notify the Employer to terminate Daniels. Later, again on an undisclosed date, since Daniels did not date his letters, Daniels wrote the Respondent a letter of resignation in which he announced that he would "continue to tender dues as long as they are legally required of me." On April 21, 1969, Respondent wrote to the Employer requesting the latter to terminate Daniels.

3. Other circumstances requiring consideration

(a) *Wage rates*

The wage rates set under the collective-bargaining agreement going into effect on May 16, 1969, which was later than the incidents involving Daniels, Haslam, and Benge, ranged from $3 to $4.71 for nonsupervisory employees. The rates of journeymen were not on a progressive scale (as were those of helpers) but varied only by the shift on which a man worked. The high rate of $4.71 was for a layerout working on the third shift. The first shift layerout received $4.41. Helpers, such as Haslam and Benge, were hired after May 16, 1969, at $3 an hour on the first shift (with a differ-

ential of 16 cents for the second shift and 26 cents for the third) and progressed at 6 month intervals with increases in four stages before they reached the top of their classification, the top being $3.50 to $3.76, depending on their shift. The evidence does not show what the rates of pay were prior to May 16, 1969, when Haslam and Benge had to pay their $250 reinstatement fees. However, the rates shown above under the collective-bargaining agreement going into effect on May 16, 1969, were the ones in effect within the Section 10(b) period, and therefore the question of whether or not the reinstatement fee was excessive[8] will be considered as of that time.

(b) *Comparison of reinstatement fees by other unions in same industry*

The General Counsel introduced in evidence an exhibit making a comparison of initiation fees, reinstatement fees, and rates of pay set by Respondent and four sister locals and by several other unions at shops in the Northern California area along with rates of pay for employees represented by such unions, and the Respondent, in turn, introduced an exhibit giving similar comparative information for journeymen's wage rates for crafts and employees in shipyards and/or field construction for other unions. The Respondent's exhibit contains no rate for a classification of helper and no rate for any employees working in industrial plants. All the rates shown on Respondent's exhibit exceed the starting wage rate at the Employer's plant by at least $1.50 (for carpenters working in shipyards) and by as much as $6.415 an hour (for steamfitters in building and construction trades). In the Respondent's exhibit, initiation fees are shown to range from one craft union to another from $20

8. I use the past tense, since Respondent, in its by-laws going into effect on December 29, 1969, adopted a sliding scale of fees similar to that of its sister locals.

to $500 (the latter being for plumbers and pipefitters, whose wage rate is $7.22 an hour, and for steamfitters working in the building and construction trades, whose wage rate is $9.415 an hour). It is interesting to note that on the Respondent's exhibit, which is based on selected unions in different crafts, whose fees are more favorable to Respondent's contentions, not one union is shown to charge a higher fee for reinstatement than for original initiation. The two unions with the highest initiation fee, the Plumbers & Pipefitters and the Steamfitters, each with a $500 initiation fee, charge for reinstatement only $1 and back dues; and, in the case of the Steamfitters, the $1 is charged only after 3 months' delinquency. Operating Engineers, with an initiation fee of $200 plus $40 International tax, charges $35 plus delinquent dues for reinstatement. The Painters, with an initiation fee of $200, charges a reinstatement fee of $200, but only after 6 months' delinquency. The Teamsters and Iron Workers each have a reinstatement fee the same as the initiation fee, but apparently (so far as appears from the exhibit) they do not require the payment of back dues in addition.

An examination of the General Counsel's exhibit, which (except for Respondent and its sister locals, who represent employees not only in shops but also doing field construction work at a higher rate of pay), is limited to unions representing shop workers whose rates of pay are comparable to those of the higher paid employees of the Employer. In five unions, other than Respondent and its sister locals, the reinstatement fee is identical to the initiation fee, with no provision for payment of back dues. Two others require a reinstatement fee equal to their initiation fee but only after 6 months' delinquency. These two also require payment of back dues. Only one sister local of Respondent (Local 94) in the Northern California area has a flat reinstatement fee ($175 for journeymen and $150 for helpers), and this is

exactly the same as its initiation fee. Three other sister locals (6, 10, and 513) are shown to have a sliding scale of reinstatement fees progressing in size from 3 months to more than 6 months, with the fee after 6 months being equal to the original initiation fee ($200 for journeymen and $150 for helpers). Assuming the monthly dues to be roughly the same as those in effect for Respondent during the same period, the reinstatement fee would, on the sliding scale, work out to approximately an amount equal to delinquent dues, current dues, and a moderate penalty. This contrasts with Respondent's requirement of $250 for helpers or $300 for journeymen after a delinquency of only 2 months, all of which sum could be viewed as a penalty at that time. Even if part of the sum exacted by Respondent could be said to be partially equivalent to monthly dues, the excess would far exceed the dues; and, it will be noted, Respondent gave only 3 months in which to pay the full amount of the reinstatement fee as compared to 6 months for sister locals. There is no indication that Respondent would accept a reinstatement fee at all after the end of 3 months, and all payments made on account in that 3 month period would be forfeited if not fully paid in that time, according to Respondent's by-laws, which incorporate the provision of the constitution of its International.

4. Conclusions as to alleged violation of Section 8(b)(5)

The Act provides in Section 8(b):

> It shall be an unfair labor practice for a labor organization or its agent . . . (5) to require of employees covered by an agreement authorized under subsection (a)(3) the payment, as a condition precedent to becoming a member of such organization, of a fee in an amount which the Board finds excessive or discriminatory under all the circumstances. In making such a finding,

> the Board shall consider, among other relevant factors, the practices and customs of labor organizations in the particular industry, and the wages currently paid to the employees affected. . . .

In the instant case the General Counsel contends only that the Respondent's reinstatement fee is excessive—not that it is discriminatory. Although the Act does not speak expressly of reinstatement fees, it is now established that a reinstatement fee is merely an initiation fee charged to a particular class of persons—those who had previously joined but are not currently members.[9] Accordingly, reinstatement fees are within the intendment of Section 8(b)(5) of the Act.

This case is not the first case where a violation of Section 8(b)(5) has been considered, but it is the first case I have come upon in which the issue raised did not embrace, in part at least, the "discriminatory" alternative of Section 8(b)(5) of the Act.[10] In *General Longshoremen's Association, Local Union No. 1419, AFL-CIO*, 186 NLRB No. 94, the Trial Examiner, whose decision the Board adopted,

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9. *Food Machinery & Chemical Corp.*, 99 NLRB 1430; *Metal Workers' Alliance Incorporated (TRW Metals Division, TRW, Inc.)*, 172 NLRB No. 34.

10. *Ferro Stamping and Manufacturing Co.*, 93 NLRB 1459; *Local 153, International Union, United Automobile, Aircraft and Agricultural Implement Workers of America*, 99 NLRB 1419; *Food Machinery & Chemical Corp.*, 99 NLRB 1430; *Local 173, International Molders & Foundry Workers Union of North America*, 120 NLRB 170; *Motion Picture Screen Cartoonists, Local 839*, 121 NLRB 1192; *Local 611, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (St. Louis Bakery Employers Labor Council et al.)*, 125 NLRB 1392; *Television & Radio Broadcasting Studio Employees, Local 804*, 135 NLRB 632; *New York Local 11, NABET*, 164 NLRB 242; *General Longshore Workers, International Longshoremen's Association, Local Union No. 1419, AFL-CIO (New Orleans Steamship Association)*, 186 NLRB No. 94.

after finding that the initiation fee of $1000, admittedly designed to discourage the entrance of casuals into the stevedoring industry, was discriminatory, commented that the case was tried on the basis that the $1000 initiation fee was excessive, but concluded that initiation fees adopted from discriminatory motives "must in the nature of things be excessive"[11] and therefore found that the $1000 initiation fee was excessive as well as discriminatory.

In the case at hand it is impossible to find excessiveness derivatively from a discriminatory motive because it was conceded here that there was no such motive. Hence, if the reinstatement fee here was excessive, it must be so determined on the ground that it is disproportionate to the employees' pay and disproportionate to the fees charges by other unions in the industry.

The Charging Parties in their brief assert that paying the helper's fee of $250 in installments of $25 a week for 10 weeks meant paying from 20 to 25 percent of the employees' weekly take-home pay. This, of course, would depend on the classification and rate of pay of employees, and take-home pay may well vary from employee to employee. On the basis of gross pay of helpers, the $25 a week would represent 18 or 20 percent of weekly gross earnings for 10 weeks. But the same percentage would be paid on the original initiation fee of $150 which could also be paid at the rate of $25 a week, albeit for 6 weeks instead of 10. Yet it is not claimed that the original initiation fee is excessive. On a total basis, the $250 fee would represent roughly 2 weeks' take-home pay (as compared to about 1¼ weeks' pay for the initiation fee) but, paid on the installment basis, this does not shock one's conscience.

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11. See also *New York Local 11, NABET*, 164 NLRB 242, and *Television & Radio Broadcasting Studio Employees, Local 804*, 135 NLRB 632.

A shocked conscience is, however, not a reliable gauge of excessiveness. The line between a lawful fee and one that is excessive under Section 8(b)(5) of the Act is not apt to be a fine one, and to split the shadowy zone on the degree of shock to the conscience of the proverbial reasonable man would be like measuring equity by the length of the chancellor's foot. In comparison with a $100 fee, a fee of $1000 might seem clearly excessive. However, if you increase the fee $1 at a time from $100, the fee could be considered excessive before the sum actually reaches $1000. But it would not be easy to say at what point it became excessive. What might be excessive in one union might not be excessive in another. This is why the size of the fee must be measured in the light of all the circumstances, for in one case a $250 fee might be deemed excessive where it would not under different circumstances. Thus, we may be assisted in fixing the figure which will be considered excessive by making a comparison with practices in the same industry by other labor organizations under like circumstances, one of which would be comparable wage rates. Three of Respondent's sister locals computed the reinstatement fee on a sliding scale of 3 to 6 months, which amounted to $50 plus the amount of dues that would have accrued in that period of time. A fourth sister local (there being only five in the area including the Respondent) charged no more for reinstatement than for initiation. In each case, the rates of pay of the represented employees was the same as those at the Employer's shop. The result is that the percentage of take-home pay required of employees represented by those sister locals as a reinstatement fee was much lower than that exacted by the Respondent.

Pertinent also to a resolution of the problem is the question of why the Respondent needed $100 more for reinstatement of a delinquent dues payer than for his original initia-

tion. The Respondent offered no explanation for the larger sum.[12] Indeed, it put no witnesses on the stand at all. Although slow payment of dues may be assumed to result in inconvenience through loss of needed funds, no showing is made that a figure based on a reasonable amount of interest would not have met the needs of Respondent. Sister locals of Respondent apparently found no such figure as $250 necessary to meet their needs. Accordingly, it was incumbent on the Respondent to prove a good reason for requiring more. This it failed to do.

Before the General Counsel amended it, the complaint referred to the alleged excessive fee as a punitive fee. Section 8(b)(5) of the Act does not concern itself with penalties as such, and the word "punitive" is not used in Section 8(b)(5) at all. The propriety of a fine or penalty for nonpayment of dues is an internal union matter—except where membership is a condition of employment, as it is here, and where employment is sought to be terminated for nonpayment as it was here. Here, the reinstatement fee was used as a form of penalty. When a penalty is used to limit an employee's right to his job, such form of penalty is one of the several circumstances to be considered in determining whether or not the fee is excessive.

Here, then, the circumstances to be considered include (1) the penal nature of the higher reinstatement fee, (2) the fact that $250 is equal to something close to 2 weeks' take-home pay for at least some of the employees;[13] a higher percentage of take-home pay than is required by other unions in the area, including sister locals of Respondent, and (3) the fact that, in the industry here involved and in

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12. See *Teamsters Local 611 (St. Louis Bakery Employers Labor Council), supra,* n.10.

13. At a starting rate of $3 an hour it would be more than 2 weeks' gross pay.

the general area of Respondent's location, nine other unions, including four sister locals of Respondent, have lower reinstatement fees than Respondent and have reinstatement fees no higher than their original initiation fees although their members' rates of pay are the same as here. The figures for initiation and reinstatement fees listed in Respondent's exhibit, heretofore mentioned, which covered eight unrelated unions, I find are not apposite since they are for unions in different industries than the manufacturing industry here involved and in industries where rates of pay are considerably higher than those paid by the Employer. However, even those figures do not give full support to Respondent's position, for only one union is there shown to charge a higher reinstatement fee than the Respondent—that is the Iron Workers, whose reinstatement fee is $300, the same as its initiation fee, but whose journeyman rate of pay is almost 50 percent higher than the Respondent's journeyman's rate at the Employer. Furthermore, the other seven unions listed on Respondent's exhibit required reinstatement fees ranging from $1 plus delinquent dues to $200 (for Painters), but the latter sum was due only after 6 months' delinquency, and the journeyman's rate for painters was $5.92 per hour as compared with Respondent's $4.35 (which presumably is an average rate, since the journeymen's rates at the Employer's plant in 1969 ranged from $3.70 to $4.71, according to the collective-bargaining agreement in evidence, and more of the rates shown there are lower than the $4.35 figure than they are higher.[14]

14. Only a layerout and a boilermaker on the second or third shift at the Employer's plant earned more than $4.35, according to the collective-bargaining agreement in evidence. The 1970 rates ranged from $3.90 to $4.96 for journeymen. Helpers still received $3 to $3.50.

In its brief, Respondent seeks to exclude from consideration the disparity between Respondent's initiation fee and its reinstatement fee by relying on the decision in *Food Machinery & Chemical Corp.*, 99 NLRB 1430. In that case, the Board held that a reinstatement fee that was in excess of an initiation fee was not discriminatory. However, in that case, it had been conceded at the outset that the reinstatement fee of $60 as against an initiation fee of $30 was not excessive; so the Board did not consider the question of excessiveness. It dealt only with the alternative part of Section 8(b)(5); so the only issue before the Board was whether or not the $60 fee was discriminatory. The Board found that it was not. If the question of discrimination were the only issue here, the result here might have been the same as in that case. However, here the issue of excessiveness of the reinstatement fee was raised, and the possible discriminatory character of it was not. Hence, neither the *Food Machinery* case nor other cases passing only on an issue of discrimination can be considered apposite here.[15]

Considering all the circumstances, then, I conclude and find that Respondent's reinstatement fee charged to employees between December 16, 1968, the date 6 months before the date of the filing of the charge, and December 29, 1969, the date on which Respondent amended its by-laws to reduce its reinstatement fee to one comparable to the reinstatement fees charged by the several sister locals, which

15. See also *Local 173, International Molders & Foundry Workers Union of North America*, 121 NLRB 170; *International Association of Machinists, Precision Lodge No. 1600*, 120 NLRB 1223 [where no violation of Section 8(b)(5) was involved—only Section 8(b)(1)(A) and (2)]; *Metal Workers' Alliance Incorporated*, 173 NLRB No. 34 [also a case under Section 8(b)(1)(A) and (2)].

used a sliding scale, was excessive under all the circumstances, within the meaning of Section 8(b)(5) of the Act.[16]

B. *Restraining or Coercing; Attempting to Cause Discrimination*

The complaint, as amended, alleges that, on several dates in 1969 and 1970, Respondent attempted to cause the Employer to discharge employees in violation of Section 8(b)(2) and (1)(A) of the Act—that it attempted to cause the discharge of Louis H. Daniels because of his failure and refusal to pay the reinstatement fee which has herein been found to be excessive and attempted to cause the discharge of Douglas C. Martin on April 28, 1970, Jeffrey Roberts on September 17, 1970, and Michael Roberts on October 7, 1970, for reasons other than their failure to tender initiation fees and periodic dues.

The facts concerning Daniels have been related heretofore in connection with the excessive reinstatement fee.

Douglas Martin was employed by the Employer as a welder's helper in late February of 1970. About a month later, Ralph Runyan, Respondent's secretary-treasurer, accompanied by Al King, a steward, approached Martin and asked Martin if he would like to join the Union. Martin replied, laconically, "No." Runyan told him, according to Martin (Runyan did not testify): "If you don't join, you can't work here." Martin replied, "I know." On a later occasion, Runyan returned, showed Martin a paper (a membership application blank) and asked if Martin was ready to sign up. Martin again answered, "No," but added that he would pay the Respondent's dues and initiation fee. Runyan, according to Martin, told Martin that if he did not join then it would cost him $300. When Martin asked, "Why so

16. Aside from the question of excessiveness of the Respondent's reinstatement fee under all the circumstances of this case, it is not suggested here that a reinstatement fee which is higher than an initiation fee is, by virtue of that fact alone, excessive.

much?" Runyan replied, again according to Martin, that it was because everyone else had signed up. The figure of $300 and Runyan's reply strike me as unusual and difficult to understand. Runyan was not called as a witness to correct the testimony, but if Runyan made some such statement, I am inclined to believe that he was either not fully, or not accurately, quoted.

On April 28, 1970, the Respondent wrote to the Employer's president asking that Martin be terminated because "Mr. Douglas Martin has failed to comply with Rule 2, Paragraph C of our existing . . . Agreement." Following the date of this demand, Martin was summoned to an office by an employer representative. When he arrived, he found present Willie Oehrlein, the Employer's plant supervisor, David Strimling, a representative of an employer's council, an employee named Kuening, and Al King, the Respondent's steward. Strimling told Martin that this was the day he was supposed to join the Respondent. Martin had in his hand $170 which he offered King, who asked Martin to sign an application for membership. Martin replied that he would not sign an application for membership[17] or take the oath but would be willing to pay the money required by the Respondent. King refused to take Martin's money unless Martin signed the application.

Jeffrey Roberts was hired by the Employer about August 1, 1970, as a welder's helper. Toward the end of that month, Runyan approached Roberts, told him his 30 days were almost up, said that Roberts had to join the Respondent, and asked Roberts to sign some papers. Roberts replied that he was willing to pay "the fees and initiation" but was not willing to sign papers or take the Respondent's oath. Roberts said that if he changed his mind, he would let Run-

17. The application form contained a statement that the signer would "agree to abide by the laws of the International Brotherhood and . . . subordinate body."

yan know. Two or three weeks later, Runyan approached Roberts again and commented that Roberts had not contacted him. Roberts told Runyan that he had said he would contact him if he changed his mind and he had not done so. Runyan asked if Roberts had $150 with him. Roberts said he did not carry that amount around with him—that he would give Runyan $50 at that time and $100 the next day. Roberts looked at the application blank Runyan carried with him and noticed the statement thereon that the signer agreed to abide by Respondent's rules. Runyan asked if Roberts was going to sign. Roberts said, "No," and Runyan left after remarking, "All right. I'll have to get you fired." Although the complaint, as amended at the hearing, alleges that Respondent requested the Employer to discharge Jeffrey Roberts on September 17, 1970, Respondent's answer had, before the amendment, denied the paragraph to which Roberts' name was added. Respondent did not amend its answer to include Roberts' name in its denial. I conclude that there was no issue as to the request for Roberts' discharge. But if failure to amend the answer was merely an oversight by Respondent, it would still not affect the result hereof because there is no evidence that Roberts was, in fact, discharged.

Michael Roberts was hired by the Employer as a welder's helper on about August 28, 1970. About 30 days later, Runyan, accompanied by a steward, told Roberts that his 30 days were up and that he should join the Respondent. He handed Roberts an application form and a beneficiary form and asked him to fill them out. Roberts read them and then asked what would happen if he refused to sign. Runyan told him that then he would be terminated. Roberts asked what would happen if he tendered the dues and initiation fee but refused to sign the forms. Runyan answered that "the lawyers" had told him not to take the money if it was

offered under those circumstances because he would have no name, address, or social security number to enter the fees under. Roberts told Runyan he would think about the matter and notify him by August 30. On that day, Roberts went to an office, presumably Respondent's, but Runyan was not in. Roberts left word with a clerk to tell Runyan he would not sign the application but would send him a money order the next day. On October 1, Roberts mailed Runyan a money order for $25 as the first installment[18] on his initiation fee but again stated that he would "not sign the union contract or take the oath." Runyan returned the money order to Roberts with a letter dated October 7, 1970, stating that he had told Roberts he could not accept his money until he had signed the application for membership. On the same date, October 7, 1970, Respondent wrote to the Employer a letter requesting it to terminate Michael Roberts.

B. *Conclusions as to Attempting to Cause Discrimination*

1. Daniels

It is alleged in the complaint that Respondent attempted to cause the Employer to discharge Daniels because of his refusal to pay an excessive reinstatement fee, and this, it is alleged, constituted a violation of Section 8(b)(2) and (1)(A) of the Act. It may be conceded that Respondent had no conscious intent to cause a discrimination against Daniels. It was seeking to enforce payment of its reinstatement fee according to its uniform practice. But if it sought to cause Daniels' discharge for nonpayment of a fine or assessment, regardless of whether or not this was its uniform practice, Respondent would be found to have attempted to cause a discrimination, for the Act authorizes

18. As previously stated, the initiation fee was permitted by Respondent to be paid in weekly installments of $25.

unions to affect an employee's employment status only for nonpayment of initiation fee or periodic dues uniformly required.[19]

There is no contention that Respondent could not suspend a member for nonpayment of dues and require him to pay a reasonable readmission fee. Nor is it denied that the Respondent had the right, under its union shop agreement, to request Daniels' discharge for failure to pay dues, alone, regardless of whether or not he had offered to pay a reinstatement fee. I find, however, that, by failing to request Daniels' discharge for nonpayment of dues alone, as it could have done in January 1969, Respondent waived any right to do this so far as the facts here are concerned. It did not request the Employer to terminate Daniels until April 21, 1969, after it had learned that Daniels had refused to pay his reinstatement fee. Meanwhile it refused to accept any dues from Daniels, delinquent or otherwise, pending payment of a reinstatement fee. When it finally did request Daniels' discharge, it did so because Daniels had failed to pay a reinstatement fee, which has herein been found to be excessive under all the circumstances. However, the excessiveness of the fee is really not of vital importance here. Regardless of Respondent's right to a reinstatement fee, Respondent's collective-bargaining agreement gave it a right to request the discharge of an employee only for nonpayment of his initiation fee or dues. The contract does not authorize the Respondent to waive the default in pay-

19. *International Longshoremen's & Warehousemen's Union Local 17*, 172 NLRB No. 227 (fine); *Local 959, International Brotherhood of Teamsters, etc. (RCA Service Company)*, 167 NLRB 1042 (working dues regarded as an assessment); *Peerless Tool & Engineering Co.*, 111 NLRB 853 (refusal to take dues without payment of an assessment); *Millwrights' Local 2232*, 122 NLRB 300 (assessment); *Tom's Monarch Laundry & Cleaning Company, Inc.*, 161 NLRB 740, 746; *John Deere Planter Workers of Deere & Company*, 107 NLRB 1497; *International Harvester Company*, 95 NLRB 730.

ment of dues and substitute as a condition of employment nonpayment of a readmission fee, which, in effect, is a second initiation fee or penalty imposed for nonpayment of dues. If Respondent wishes to enforce an obligation to pay a readmission fee, it must do so in the same manner in which it would enforce the payment of a fine or assessment and not by attempting to cause a discriminatory discharge. I conclude and find, therefore, that, by attempting to cause the Employer to discharge Daniels for nonpayment of a second initiation fee (whether excessive or not), Respondent violated Section 8(b)(2) and (1)(A) of the Act.

2. Martin and the two Roberts

It is clear that Respondent refused to accept payment of initiation fees and dues from Martin and each of the Roberts because they would not sign an application for membership. Each offered payment but it was declined by the Respondent because they would not sign such application blank. Even though the Respondent's collective-bargaining agreement conditioned employment upon an employee's becoming a member in good standing, this could not be insisted upon beyond the requirement of tender of periodic dues and the initiation fees uniformly required. The law on this point has been settled since the Board's decision in *Union Starch and Refining Co.*, 87 NLRB 779 [enf'd 186 F.2d 1008 (C.A. 7), cert. den. 342 U.S. 815]. The distinction between voluntary, full membership and compulsory membership limited to the payment of initiation fees and dues is important when considered in the light of the decision in *N.L.R.B. v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175. If an employee signs a membership application blank in which he agrees to be bound to union rules, he is subjecting himself to possible fines which could

not be imposed on those who pay only the initiation fees and dues which the Act permits to be charged by a union as a condition of continued employment. The Act does not require that an employee sign a contract imposing on him obligations other than the duty to pay initation fee and dues.

In its letters requesting the termination of Daniels, Martin, and Michael Roberts, which are in evidence, Respondent gave, as the reason for its request for their termination, only that each had "failed to comply with Rule 2, Paragraph 'C' of our . . . Agreement." This does not accurately state the real reason for the request for their termintion, and the Employer presumably knew the real reason and refused to act on the Respondent's request. Whether or not there has been a violation of Section 8(b)(2) and (1)(A) depends on the real reason and not on merely the stated reason. In this case, therefore, I make my decision based on the reasons which I have hereinabove found to be the true ones motivating the Respondent. Accordingly, I find that the Respondent, by requesting the termination of employment of Daniels, Martin, Jeffrey Roberts and Michael Roberts, for the reasons found, violated Section 8(b)(2) and (1)(A) of the Act.

VI. The Effect of the Unfair Labor Practices Upon Commerce

The activities of the Respondent, set forth in Section V, above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow thereof.

VII. The Remedy

I have found that the Respondent violated Section 8(b)(5) of the Act in exacting a reinstatement fee which was excessive under all the circumstances. Accordingly, I shall recommend that it cease and desist therefrom and that it refund excess payments made to it by its suspended members in the collective-bargaining unit here involved during the period from December 16, 1968, to December 29, 1969, which includes the time beginning with the earliest date under the limitation of Section 10(b) of the Act and ending with a date determined by the date when Respondent adopted new by-laws reducing its reinstatement fee. A question may be raised as to whether the "excess" should be that which exceeds Respondent's original initiation fee of $150 for helpers and $200 for journeymen or that which exceeds the reinstatement fees adopted on December 29, 1969. Since no contention is made that the initiation fee, itself, is excessive, I find it more reasonable here to accept that as also a readmission fee which would not be excessive, and I shall fashion the remedy accordingly.

Employees William R. Haslam and Ernest J. Benge were alleged in the complain to have been required to pay an excessive reinstatement fee. Although they were required to pay this fee as a condition of continued employment, which has been found herein to be an illegal condition, the complaint did not allege, as to them, or as to any other except Daniels, a violation of Section 8(b)(2) of the Act by requiring the payment of a readmission fee as a condition of continued employment. The complaint alleged only a violation of Section 8(b)(5) as to Haslam and Benge. For this reason, I shall not recommend an order that Respondent refund the entire $250 reinstatement fee to each of them but I shall recommend an order that Respondent repay each of them (other than Daniels) only the

amount found to be excessive, i.e. $100. This is the appropriate remedy not only for Haslam and Benge but also for others in the unit who were required to pay such excessive amount.

Since the Employer did not discharge Daniels, Martin, Jeffrey Roberts, or Michael Roberts, no reinstatement remedy is required. I shall therefore merely recommend an order that Respondent cease and desist from attempting to cause the termination of those or any other employees of the Employer for any cause other than the nonpayment of initiation fees or periodic dues, and that Respondent return to said Daniels any sum he may have been compelled by Respondent to pay on a readmission fee as a condition of continued employment.

Upon the basis of the foregoing findings of fact and upon the entire record in the case, I make the following:

Conclusions of Law

1. The Employer is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Respondent is a labor organization within the meaning of Section 2(5) of the Act.

3. By requiring dues-delinquent members to pay a reinstatement fee which was excessive under all the circumstances, Respondent engaged in unfair labor practices within the meaning of Section 8(b)(5) of the Act.

4. By attempting to cause the Employer to terminate the employment of Louis Daniels, Douglas C. Martin, Jeffrey Roberts, and Michael Roberts for reasons other than nonpayment of initiation fees or dues uniformly required as a condition of continued employment under its lawful union shop agreement, Respondent has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(b)(2) and (1)(A) of the Act.

5. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

Upon the foregoing findings of fact and conclusions of law, and upon the entire record in the case, and pursuant to Section 10(c) of the National Labor Relations Act, as amended, I hereby issue the following recommended:[20]

ORDER

Respondent, Local Union No. 749, International Brotherhood of Boilermakers, Iron Shopbuilders, Blacksmiths, Forgers & Helpers, AFL-CIO, its officers, agents and representatives, shall:

1. Cease and desist from:

(a) Requiring of any employees covered by an agreement, authorized under Section 8(a)(3) of the Act, the payment, as a condition precedent to reinstatement as members of such organization, of a fee in an amount which has herein been found to be excessive under all the circumstances.

(b) Causing or attempting to cause the Employer to discriminate against any employee (including Louis H. Daniels, Douglas C. Martin, Jeffrey Roberts, and Michael Roberts) for failure to pay any moneys or perform any act other than failing to pay moneys due as an initiation fee or periodic dues uniformly required as a condition of employment under an agreement authorized in Section 8(a)(3) of the Act.

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20. In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

(c) In any like or related manner restraining or coercing employees of the Employer in the exercise of the rights guaranteed in Section 7 of the Act.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act:

(a) Refund to each employee of the Employer (including William R. Haslam and Ernest J. Benge) who, between December 16, 1968, and December 29, 1969, was required by Respondent to pay a reinstatement fee, such as has been found herein to be excessive, the sum of $100.

(b) Pay to Louis H. Daniels any sum he may have paid in excess of the dues required of him to maintain membership in Respondent as a condition of employment.

(c) Rescind, in a writing sent to the Employer, its requests for the termination of Louis H. Daniels, Douglas C. Martin, Jeffrey Roberts, and Michael Roberts.

(d) Notify said Daniels, Martin, Jeffrey Roberts, and Michael Roberts, in writing, if they are still employed by the Employer, that it has rescinded its request for their termination of employment and that it will not require them to perform any act or pay any moneys as a condition of continued employment except to pay that sum of money which is uniformly required as an initiation fee or periodic dues in accordance with an agreement requiring membership in Respondent as authorized in Section 8(a)(3) of the Act.

(e) Post at its offices and at its meeting place where members who are employed by the Employer meet, copies of the attached notice marked "Appendix."[21] Copies of said

21. In the event that the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

notice, on forms provided by the Regional Director for Region 20, shall, after having been duly signed by Respondent's representative, be posted by Respondent immediately upon receipt thereof and be maintained by Respondent for 60 consecutive days thereafter, in conspicuous places, including all places where notices to members are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(f) Upon receipt from said Regional Director of additional copies of said notice, sign them and mail them to the Regional Director for Region 20 for posting at the plant of the Employer at Escalon, California, the Employer being willing.

(g) Notify the Regional Director for Region 20, in writing, within 20 days from the date of receipt of this Decision and recommended Order, as to what steps Respondent has taken to comply herewith.[22]

Dated: Jan 28 1971

/s/ JAMES R. HEMINGWAY
James R. Hemingway
Trial Examiner

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22. In the event that this recommended Order is adopted by the Board after exceptions have been filed, this provision shall be modified to read: "Notify the Regional Director for Region 20, in writing, within 20 days from the date of this Order, as to what steps the Respondent has taken to comply herewith."

NOTICE TO EMPLOYEES AND MEMBERS

POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD

AN AGENCY OF THE UNITED STATES GOVERNMENT

The Decision of a Trial Examiner of the National Labor Relations Board held that, between December 16, 1968, and December 29, 1969, we required employees (covered by an agreement with California Blowpipe & Steel Co., Inc., requiring membership in Local 749 as a condition of employment) to pay a reinstatement fee which was excessive under all the circumstances, and that as a condition of employment, we required the performance of acts or the payment of an amount other than the payment of the initiation fees and dues uniformly required to become and remain members as required under the terms of our union shop agreement with said Employer, and that we thereby violated Section 8(b)(1)(A), (2), and (5) of the National Labor Relations Act, as amended.

To remedy such unfair labor practices:

WE WILL NOT require the payment by any employee covered by an agreement authorized under Section 8(a)(3) of the Act, of a fee in an amount which the Board finds excessive under all the circumstances.

WE WILL NOT cause or attempt to cause said Employer to discriminate in regard to the hire or tenure of employment of any employee except to the extent authorized by an agreement made in accordance with Section 8(a)(3) of the Act. This means that we will not request the discharge of any employee, who is covered by a union-shop agreement, for any reason other than the failure of such employee to tender the payment of initiation fee or periodic dues.

WE WILL refund $100 to each employee of said Employer who, between December 16, 1968, and December 29, 1969, was charged an excessive reinstatement fee.

Among others who paid such excessive reinstatement fee and are entitled to such a refund are:

WILLIAM R. HASLAM
ERNEST J. BENGE

WE WILL pay to LOUIS H. DANIELS whatever sum he may have paid over and above the initiation fee and the periodic dues we required him to pay as a condition of continued employment in 1969.

WE WILL notify said Employer in writing that we withdraw our request for the termination of employment of the following employees;

LOUIS H. DANIELS
DOUGLAS C. MARTIN
JEFFREY ROBERTS
MICHAEL ROBERTS

and we will notify each of said employees in writing that we have withdrawn our request for termination of their employment.

LOCAL UNION NO. 749, INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRON SHIPBUILDERS, BLACKSMITHS, FORGERS & HELPERS, AFL-CIO
(Labor Organization)

Dated ..... By .....
(Representative) (Title)

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

Any questions concerning this Notice or compliance with its provisions, may be directed to the Board's Office, 13050 Federal Building, 450 Golden Gate Avenue, Box 36047, San Francisco, California 94102 (Tel. No. 415-556-0335).

Appendix C

The pertinent statutory provisions of the National Labor Relations Act, as amended, are:

§ 7 (29 U.S.C. 157):

> "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3)."

§ 8(a) (3) (29 U.S.C. 158 (a) (3)):

> "8. (a) It shall be an unfair labor practice for an employer—
>
> (1) ...
>
> (2) ...
>
> (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8 (a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9(a), in the appropriate collective-bargaining unit covered by such

agreement when made, and (ii) unless following an election held as provided in section 9 (e) within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: *Provided further,* That no employer shall justify any discrimination against an employee for non-membership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;"

§ 8 (b) (1) (A) (29 U.S.C. 158 (b) (1) (A):

"(b) It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: *Provided,* That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein;"

§ 8 (b) (2) (29 U.S.C. 158 (b) (2)):

"(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a) (3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;"

§ 9 (e) (1) & (2) (29 U.S.C. 159 (e) (1) & (2)):

"(e) (1) Upon the filing with the Board, by 30 per centum or more of the employees in a bargaining unit covered by an agreement between their employer and a labor organization made pursuant to section 8 (a) (3), of a petition alleging they desire that such authority be rescinded, the Board shall take a secret ballot of the employees in such unit and certify the results thereof to such labor organization and to the employer.

(2) No election shall be conducted pursuant to this subsection in any bargaining unit or any subdivision within which, in the preceding twelve-month period, a valid election shall have been held."

Appendix D

United States Court of Appeals
for the District of Columbia Circuit

No. 71-2006

[Title of Court and Cause omitted]

Filed: August 17, 1972
Before: McGowan, Leventhal and MacKinnon,
Circuit Judges.

ORDER

On consideration of petitioner's motion for rehearing, it is

ORDERED by the Court that petitioner's aforesaid motion is denied.

Per Curiam

For the Court:

NATHAN J. PAULSON, Clerk

By: HUGH E. KLINE
Hugh E. Kline
Chief Deputy Clerk